A MANUAL FOR CLAIMANTS

HOW TO APPEAL A SOCIAL SECURITY/SSI CASE

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

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INTRODUCTION

This manual is intended to help you file and pursue an appeal in federal court from the decision of the Appeals Council[1] of the Social Security Administration. The appeal in court is called an "action," "lawsuit" or "case." It must be started in the federal District Court. The information in this manual applies only to appeals in cases where your application for disability benefits has been denied (or your disability benefits have been cut off by the Social Security Administration) and you have already lost all your appeals at the administrative level. This means that you have lost your hearing before an Administrative Law Judge and, after that, the Appeals Council sent you notice one or two months later stating that the hearing decision denying or terminating your benefits was correct. Before you may bring an action in the federal District Court, you must have completed these two administrative proceedings. This is called "exhausting your administrative remedies."

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[1] The Appeals Council is the Appeals Council of the Office of Hearings & Appeals in the Social Security Administration. It reviews the Administrative Law Judge's hearing decision upon a party's request. 20 C.F.R.§§ 404.2(b)(3) and 404.967 (1989). The "Appeals Council Review" means you have appealed your hearing decision to the Appeals Council in Washington, D.C., and have received written notification from it upholding the hearing decision made by the Administrative Law Judge.

Section One of this manual describes the steps to follow and the forms you must complete in order to begin and pursue your case. It also includes brief explanations of certain legal terms and court procedures. These are intended to help you understand the legal process in the federal court and how it works in disability cases.[2] Section Two explains the various legal arguments which may be available to support your claim that the Secretary's decision in your case was incorrect. Also included in this manual are copies of the forms you may need to complete in order to start your case and to make certain requests to the judge as your case goes through the court process.

This manual assumes that you have already made the decision to proceed with your case without a lawyer. IF IT IS AT ALL POSSIBLE TO DO SO, YOU SHOULD GET A LAWYER. Bringing a lawsuit by yourself will require a great deal of your time. You will have to learn rules which are difficult to follow, and will have to research the laws applying to your claim. You will also have to gather evidence to support your claim. Even if your claim is valid, the court may dismiss your case if you fail to follow the rules carefully. Without a lawyer, your inexperience may cause you to lose your case

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[2] Following the instructions in this manual does not mean that you will win your case and receive benefits. Each case depends on its own particular facts. But following the instructions will definitely give you a better chance.

on a technicality or a missed opportunity.

The federal court for the Southern District of New York has a panel of lawyers who have volunteered to represent some litigants who are unable to hire their own lawyers. If you are unable to obtain a lawyer, you can ask the court to appoint a volunteer lawyer either when you commence your action or once your case has been filed and assigned to a judge. To ask for a volunteer lawyer, obtain an application form from the Pro Se Clerk's Office. You are not guaranteed that a lawyer will be appointed. The court will decide whether your case appears to have enough merit to appoint a lawyer for you. Unless and until a lawyer is appointed, you are responsible for handling your case.

Sometimes the law allows a lawyer appointed by the court to collect a fee if s/he wins the case or obtains a settlement in your favor. Some laws (especially in disability cases) allow the lawyer to take a fee from the money won in the case. The lawyer may also ask you to pay or to promise to pay the expenses of bringing the lawsuit. At the time a lawyer is appointed to your case, you should ask the attorney to tell you in writing if s/he will charge a fee and what the fee will cover. You should also ask the lawyer to tell you in writing which expenses you will have to pay.

The Pro Se Clerk's Office has copies of the guidelines about the volunteer lawyers. You can ask for a copy. The guidelines explain when and how the court appoints volunteer lawyers. They also

explain how the lawyer can ask the judge to let him withdraw from the case and how you can ask the judge to let you remove the lawyer from the case.

Another possibility is to try to get a lawyer from the Legal Aid Society or Community Action for Legal Services to handle your case. The main telephone number for Legal Aid is (212) 227-2755; the main number for Legal Services is (212) 431-7200. When you call either of these offices, explain that you have a "disability" case. Tell the operator your address and zip code and ask for the address and phone number of the local office which services your neighborhood.

There are other organizations that give free legal help. A list of some of these organizations is available from the Pro Se Clerk's Office.

SECTION ONE: STARTING YOUR CASE AND PURSUING YOUR APPEAL

PART ONE: THE SUMMONS AND COMPLAINT, SERVICE OF PROCESS AND THE ASSIGNMENT OF YOUR CASE

PRO SE CLERK'S OFFICE

There is an office at the court which helps persons who do not have a lawyer. This office, which is known as the Pro Se Clerk's Office, will help you get your disability case started. It is located on the ground floor of the United States Courthouse, Room 41, 40 Centre Street, New York, New York 10007. The telephone number is (212) 791-0165. The office is open Monday through Friday from 8:30 a.m. to 5:00 p.m. If you don't understand something or are confused about what to do, ask the Pro Se Clerk to help you. The Pro Se Office is only authorized to give out limited procedural advice. The office cannot complete your papers for you and cannot act as your attorney.

STEPS YOU MUST COMPLETE TO BEGIN YOUR LAWSUIT

In order to begin your lawsuit, you must properly complete the following four steps:

1. Write your complaint.
2. File your complaint with the court.
3. Have your complaint delivered to ("served on") the Secretary of Health and Human Services.
4. Notify the court that the Secretary has received the complaint.

These steps will be described in detail in the next section.

THE SUMMONS AND COMPLAINT

WHAT ARE THE SUMMONS AND COMPLAINT?

You may begin your case in court after you have received a written decision from the Appeals Council in Arlington, Virginia or Washington, D.C.

The legal papers that begin a lawsuit are called the summons and complaint. Your case is started when you file a complaint in the District Court for the district in which you live. The purpose of the complaint is to tell the court why you are appealing your case to the District Court, the reason(s) you feel the Social Security Administration's decision was wrong and what remedy you are seeking from the court.[3] The summons tells the Social Security Administration that you are suing them, and that it has 60 days to answer your complaint.[4]

The top of the first page of the complaint lists you as the plaintiff (the person who is suing). The Secretary of Health and Human Services, who is the head of the Social Security Administration, is the defendant (the person you are suing). (In

[3] Fed. R. Civ. P. 8(a).

[4] Fed. R. Civ. P. 12(a).

this manual, the terms "the Secretary," "Social Security Administration," and "the agency" mean the same thing. They should all be considered "the defendant.")

HOW TO WRITE YOUR COMPLAINT

Type your complaint if possible. If you do not have access to a typewriter, use a pen and print legibly. There is a complaint form in the Appendix of this book (Form Number 1). Copies of this form are also available in the Pro Se Clerk's Office. FILL OUT THE FORM COMPLETELY AND HONESTLY.

WHEN YOU MUST FILE YOUR COMPLAINT

YOU MUST FILE YOUR COMPLAINT WITHIN 60 DAYS FROM THE DATE YOU RECEIVED THE DECISION OF THE APPEALS COUNCIL IN THE MAIL.[5] (The law presumes that you received the Appeals Council decision 5 days after the date stamped on the decision unless you can prove that you actually received it later.)[6] When counting the 60 day period, Saturdays, Sundays and holidays should be included.[7]

The courts take these time limitations very seriously; if you wait

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[5] 42 U.S.C. § 405(g) (1983 & Supp. 1990); 20 C.F.R. §§ 404.981, 422.210(c)(1989).

[6] 20 C.F.R. § 422.210(c)(1989); Matsibekker v. Heckler, 738 F.2d 79, 81 (2nd Cir. 1984). The group of numbers after the name of the case is called a citation.

[7] Fed. R. Civ. P. 6(a); Saturdays, Sundays and legal holidays do not count if they are the last day of the period. The next regular weekday will count as the 60th day.

longer than 60 days to file your complaint, it is likely the court will dismiss your case. Even if your complaint is filed only one or two days late, it can be dismissed by the court on its own motion or at the Secretary's request.

If you wish to appeal an Appeals Council decision, but it is clear that the 60 day period has already run out in your case, there is a procedure available to try to extend the time for filing your complaint.[8] You must obtain the approval of the Appeals Council granting you additional time to file your complaint in the District Court.[9] You should write the Appeals Council a letter containing the following: 1) your request for an extension of time to file a civil lawsuit in the Federal District Court; and 2) your explanation of the reason(s) why you couldn't file your complaint within the 60 day period.[10] If the Appeals Council finds that you have shown good cause for missing the deadline, they will grant you an extension.[11]

There are various reasons why the Appeals Council may grant you an extension. The following are examples of some of these reasons:

a) you were seriously ill and could not find a friend or relative to help file your papers;

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[8] 20 C.F.R. § 404.982 (1989).

[9] Id.

[10] Id.

[11] Id.

b) there was a death or serious illness in your family;

c) when you originally received the Appeals Council decision, you asked for additional information or explanation and never received it, or received it after the 60 day period had expired;

d) you thought you needed more documents or medical records and spent time trying to obtain them;

e) you appealed to another government agency to obtain your benefits and, by the time you learned you had to appeal to the court, your time had expired;

f) any other special or unavoidable circumstances which explain or show why you missed the 60 day period;

g) important records were destroyed; or

h) you did not receive notice of the decision.[12]

Your letter should be mailed to the Department of Health and Human Services, Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA, 22203. Include the date, your address and Social Security number on all letters and keep a copy of everything you mail. It is suggested that you send one copy of your letter by regular mail and another copy by certified mail, return receipt requested. If you have any documents which help prove one of the reasons stated above, then make copies and include them with your letter.

When you receive an answer from the Appeals Council about the extension, go to the District Court and file your complaint. File your complaint even if the Appeals Council has denied your extension request. If your extension was denied, you can also

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[12] Id. at § 404.911(b)(1989).

appeal that decision to the court along with the Secretary's decision denying or terminating your benefits.[13] Remember to state somewhere in your complaint that you are appealing the Appeals Council denial of your extension request as "arbitrary, capricious, unfair and unjust." Also, describe the reasons you gave to the Appeals Council and include copies of any documents you sent them.

Once you have checked that you are within the 60 day period or have made an extension request to the Appeals Council and have received an answer, your next step is to actually file your complaint. Filing your complaint with the court requires a special procedure. You must follow the procedure or you will not be able to begin your lawsuit.

You may file your complaint either in person or by mail.

STEPS FOR FILING YOUR COMPLAINT IN PERSON

STEP 1: First, make one copy of your completed complaint for your own records. Also make a copy of your letter from the Appeals Council and attach this to the complaint you are filing in the court.

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[13] Once the Appeals Council has made a decision refusing to grant your request for an extension of the 60 day period there are only certain limited circumstances in which a District Court will consider reversing such a decision. Thus, if the Appeals Council has denied your request to extend the 60 day period to file an appeal, it will be difficult to obtain a reversal of that denial from the District Court. You should, however, still request that the District Court consider your claim for an extension of the 60 day filing period.

STEP 2: Take the original complaint to the Pro Se Clerk's Office of the United States District Court for the Southern District of New York. For persons living in Manhattan and the Bronx, you must file your complaint in the United States District Court for the Southern District of New York located at 40 Centre Street in Manhattan. There is also a branch at 101 East Post Road, White Plains, where you can file your complaint if it is more convenient (however, there is no pro se office to assist you in White Plains). When you file your complaint, if you wish to try to obtain a lawyer to represent you, you should ask the Pro Se Clerk for an application to have an attorney appointed for you. If the Judge grants your application the court will then try to find an attorney to take your case. Remember, however, that there is no guarantee that an attorney will actually be found to represent you.

STEP 3: There is a $120 filing fee that must be paid at this time. If you cannot afford to pay the $120 fee, you may file an application to proceed in forma pauperis (as a poor person). If you qualify for in forma pauperis status, the court will consider your case like anyone else's, but you will be allowed to file and serve your complaint without paying the usual fee. You can get an application to proceed in forma pauperis from the Pro Se Clerk.[14]

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[14] In this application, you must fill out a statement for the court briefly describing the amount of your weekly or monthly income, and any bank accounts or property of any value. You cannot get in forma pauperis status unless you have little or no money in any bank accounts, own no valuable property, and have only a small

STEP 4: The clerk in the Pro Se Office will stamp your complaint with the date you brought in the complaint and will also stamp your copy.

STEP 5: The clerk will tell you what steps you must take next.

STEPS FOR FILING YOUR COMPLAINT BY MAIL

If you are unable to file your complaint in person, you may file it by mail. If you are filing it by mail, you must send the following items to the Pro Se Clerk's Office:

1. the original complaint, together with a copy of the letter from the Appeals Council;
2. at least one extra copy of the complaint; and
3. the $120 filing fee (or, if you cannot afford the fee, an application to waive the filing fee; see Steps for Filing Your Complaint in Person, Step 3, page 12).

Be sure to keep one copy of the complaint for yourself. After the Pro Se Clerk's Office receives the items you mailed, the office will send you further instructions on getting your suit properly started.

After the complaint is filed, the court requires that the defendant

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income. If the application is granted, the court will then allow you to file your complaint without paying the fee. You will not have to pre-pay anything to file or serve your complaint if the court decides that you meet the standards to be considered indigent (a "poor person").

Secretary receive a copy of it along with the summons.

STEPS FOR SERVICE OF PROCESS IF YOU ARE NOT INDIGENT

If you are not allowed to proceed in forma pauperis, you will have to arrange to have your complaint and summons delivered to the defendant Secretary.[15] This is known as "service of process." This will be the first official notice to the Secretary that you are suing him or her. There are specific rules describing how the Secretary must receive your summons and complaint. If the rules are not followed exactly, the defendant will not have to answer your lawsuit and the court will reject your complaint.

If your application to proceed in forma pauperis is granted, the Pro Se Clerk will arrange to have the summons and complaint delivered to the Secretary according to the rules. If you are not designated a "poor person," you must make the necessary arrangements yourself, as explained in the next four pages. It is extremely important to follow these instructions carefully.

You cannot deliver your own complaint and summons. The person who delivers your complaint and summons must be someone who is: 1) not a party in the suit, that is, a plaintiff or a defendant; and 2) 18 years of age or older.[16]

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[15] Fed. R. Civ. P. 4(a).

[16] Id. at Rule 4 (c)(2)(A).

The person who delivers your complaint can be a friend or can be a professional "process server." Because proper delivery is extremely important, it is best to use a professional process server. Look in the yellow pages of your local telephone directory to locate process servers for hire. Process servers will charge you a certain rate to serve your complaint. If you cannot afford that charge, then have a reliable friend serve the papers. (You can't do it yourself). Make sure your friend follows all of the steps listed below.

There are four steps in having your summons and complaint delivered if you are suing the Secretary of Health and Human Services.

1. Have a copy of the summons and complaint delivered to the United States Attorney for the Southern District of New York (or to an employee of the United States Attorney who is authorized to receive a summons and a complaint); AND

2. Mail another copy of the summons and complaint by registered or certified mail to the Attorney General of the United States Department of Justice, Constitution Avenue and 10th Street N.W., Washington, D.C. 20530; AND

3. Mail another copy of the summons and complaint by registered or certified mail to the Secretary of Health and Human Services, 200 Independence Avenue S.W., Washington, D.C. 20201.

4. After the person delivering the copy of the summons and complaint completes the task, s/he must fill out a statement

called an "affidavit of service" or "affirmation of service." (Remember, an affidavit must be signed in front of a notary, but an affirmation may be signed without a notary.)[17] They are both statements signed by the person who delivered the complaint which says exactly who the copy of the summons and complaint was delivered to and how it was delivered (for example, by bringing it to the U.S. Attorney's Office in person).[18] It also says that a second copy was mailed to the Attorney General and a third copy to the Secretary). This sworn statement must then be filed along with the original summons with the clerk of the court. The affidavit or affirmation serves as proof that the complaint and summons were delivered to the Secretary. Keep a copy of this proof of delivery for your own records.

Someone in the U.S. Attorney's office is usually willing to sign the original summons and complaint to acknowledge that the office has received its copy. If this is done, you don't have to have an affidavit or affirmation filled out swearing that the U.S. Attorney's office was served. A signed acknowledgment from someone in this office on the original legal papers is sufficient "proof of service" of delivery to that office. Even if the U.S. Attorney's office signs the original summons and complaint, an affidavit or affirmation is still required as proof that copies of

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[17] Id. at Rule 4(g).

[18] Fed. R. App. P. 25(d).

the summons and complaint were mailed to the Attorney General and Secretary (See steps 2 and 3, above).

THE ASSIGNMENT OF YOUR CASE

WHAT HAPPENS AFTER YOU FILE YOUR COMPLAINT

When your complaint against the Secretary is filed, your case will then be assigned to a District Court judge. The case will also be assigned a docket number to identify it. The judge may choose to handle your case him/herself, or the judge may send all or part of your case to a magistrate.

A magistrate is a judicial officer who does not have all the authority of a regular District Court judge. If all or part of your case is assigned to a magistrate, the magistrate will evaluate your case exactly like a judge would, and then will make a recommendation to and report for the District Court judge. The District Court judge makes the final decision at the District Court level. Most often, the decision of a magistrate is approved by the District Court judge. The judge may reconsider the magistrate's

decision if the judge believes it is clearly wrong or contrary to the law.

If you disagree with anything in the magistrate's report, you must send your objections in writing to the judge, the magistrate and to the Secretary within 10 days of receipt of the magistrate's report. [19] Your objections must be specific. A general statement that you disagree with the report and its recommendation is not enough. Your objection must state specifically why you believe a decision made by the magistrate is wrong under the circumstances, or why you believe a decision made by the magistrate is contrary to the law. The judge will usually review only those parts of the report to which you object. The judge will then make a final decision.

[19] 28 U.S.C. § 636(b)(1)(C)

PART TWO: THE GOVERNMENT RESPONDS TO YOUR COMPLAINT

THE ANSWER

WHAT IS AN ANSWER

After you file your complaint, the defendant, Secretary of Health and Human Services, has 60 days within which to file a written "answer" to your complaint.[20] The defendant Secretary must send you a copy of his/her "answer." [21] The Secretary's answer usually states that s/he believes your application for benefits was properly denied or that your benefits were properly terminated. The answer usually requests that the judge agree with the Secretary's decision denying or terminating benefits in your case and, therefore, that the judge dismiss your complaint.

REQUEST FOR EXTENSION OF TIME TO ANSWER YOUR COMPLAINT

Often, the Secretary will want to extend the time for filing his/her answer to your complaint. If so, you will receive this request in the mail from the office of the U.S. Attorney (the lawyer for the Secretary) asking you to agree to an extension of time for the Secretary to answer your complaint. The Secretary usually requests an extension of time to answer because preparation of the answer also requires the Social Security Administration to give you and the court a complete written transcript of your hearing together with copies of every medical document in your

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[20] Fed. R. Civ. P. 12(a).

[21] Id.

disability file which was used at your hearing.[22] These papers often add up to more than 100 pages. The Secretary usually claims that it takes many months to get all these papers together for the court. These papers are officially called the "record" in your case.[23]

The Secretary's request for an extension of time to answer your complaint will also probably include a legal form, known as a stipulation, for you to sign if you agree to an extension. If you agree to it, the court will give the Secretary an extension.[24] This is called extension by stipulation. YOU DO NOT HAVE TO AGREE TO THIS EXTENSION. (See "MOTION FOR EXTENSION" BELOW, PAGES 24 and 25.)

You might also receive papers from the U.S. Attorney asking you to agree to a "remand" of your case to the Secretary for further proceedings. This means that you are being asked to agree to send your case back to the Appeals Council or to the first judge who

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[22] 42 U.S.C. § 405(g)(1983 and Supp. 1990).

[23] The record will usually contain copies of all important documents in your case. These include your application, reconsideration decision(s), medical records, transcript of any hearing that was held, the Administrative Law Judge's decision and the Appeals Council's decision. YOU CAN REQUEST A COPY OF THE RECORD FROM THE SECRETARY AT ANY TIME, AT NO EXPENSE TO YOU. 20 C.F.R. § 404.951. YOU SHOULD DEFINITELY DO SO, BECAUSE IT WILL BE EXTREMELY HELPFUL TO YOU IN PREPARING YOUR CASE.

[24] Fed. R. Civ. P. 6(b).

held the original administrative hearing in your case. You do not have to sign this paper. If you sign such papers it means that the complaint you filed in the District Court will not go forward; your complaint will either be delayed or dismissed.

On the other hand, a remand will give you a new opportunity to convince the Secretary that you are entitled to benefits, perhaps based on evidence you had not previously presented. If you did not have an attorney before, you may have an attorney at the hearing on remand. If the judge is likely to remand your case in any event (see pp.46-47), your consent to this procedure may avoid additional delay.

AFTER FILING YOUR COMPLAINT, DO NOT SIGN ANY PAPERS THAT YOU DO NOT UNDERSTAND. BRING THESE PAPERS IMMEDIATELY TO THE PRO SE CLERK'S OFFICE AND THEY WILL EXPLAIN THEM TO YOU.

PART THREE: MOTIONS

MOTIONS

WHAT IS A MOTION?

After you've filed your complaint, the attorney for the defendant Secretary may make certain written requests to the judge. These requests are called motions. Sometimes a motion will be made before filing an answer or instead of filing an answer. The law requires that you receive a copy of any motion made by the Secretary.[25] You can reply in writing to any of the Secretary's motions.

You can also make a motion. The Secretary must receive a copy of any motion you may file in your case. S/he can reply to your motions.

See pages 30-34 for further information about how any motion you make should be prepared and sent to the defendant and the court.

THE MOTION FOR AN EXTENSION

If you do not agree to the Secretary's request for more time to answer, the Secretary will still apply to the court for an extension[26] by making a motion to the court for an extension. You

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[25] Fed. R. Civ. P. 5(a).

[26] Fed. R. Civ. P. 6(b).

will receive a copy of this motion from the Secretary. You can answer the Secretary's motion for an extension by writing and filing your own papers with the Clerk of the Court objecting to the extension.

When objecting to the Secretary's request for an extension of time, you may argue that any more time given to the Secretary will harm you because it delays your eventual receipt of benefits. You can therefore ask the court to grant you immediate benefits for at least those extra months that the Secretary is seeking for the extension.[27] These temporary benefits are known as "Interim Benefits." For example, if the Secretary wants an additional three months to answer your complaint, in your objection to the Secretary's motion, you should ask for three months of disability benefits. You should keep in mind, however, that 1) interim benefits are not always awarded[28], and 2) if they are awarded and you are later unsuccessful in seeking disability benefits, the Secretary can try to recoup all of the money granted as temporary benefits. (See INTERIM BENEFITS, page 27).

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[27] 42 U.S.C. § 423(g)(1990).

[28] In many cases the Secretary will object to your request for "Interim Benefits". The District Court Judge will decide if the circumstances in your case justify granting such benefits at this point in your case.

MOTION TO REMAND[29]

A motion may be made by the Secretary to remand or send your case back to the Social Security Administration for a new hearing or for further evaluation.

The Secretary's motion papers must state the reason why s/he wants to send your case back to the agency.[30] Some examples of reasons given are that the Social Security Administration has lost your file or can't transcribe the record because the hearing tape is missing or cannot be understood. Another reason is that the Secretary might agree (before the judge actually reviews the case) that a mistake was made at your hearing when the administrative law judge considered the evidence and, therefore, the Secretary may ask the District Court judge to give you a new hearing to reconsider the evidence.

In reply to the Secretary's motion to remand your case, you can ask the judge a) to grant you interim benefits (see Interim

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[29] This section describes the reasons why the Secretary may request that the judge order that your case be sent back (remanded) to Social Security for further review before the judge decides your case. Later in this manual, there is another section describing the various things the judge can do in your case once s/he decides to look into the Secretary did in your case. (See WHAT THE JUDGE CAN DO, pages, 42-46.) No matter what the Secretary requests, however, the judge can also decide on his or her own to remand your case for further review.

[30] Fed. R. Civ. P. 5(a) and Joint Local Civil Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, Rule 3(b)(1983).

Benefits below); and/or b) to require the Secretary to schedule your hearing or other review process quickly, and to specify in writing a certain time period within which the review must be done; and/or c) to refer your case to a different administrative law judge than the one who was at your original hearing.

INTERIM BENEFITS

As a general rule, if the judge is going to send your case back to the Social Security Administration for further administrative review or a hearing, you should always ask the judge to temporarily grant or restore your benefits at least until this new administrative review process is complete. Disability benefits granted for the period of your new administrative review are known as interim benefits.[31]

If your case is sent back for a new hearing because the Social Security Administration lost your previous transcript, you are entitled to interim benefits until a new decision is made. Not everyone, however, has a right to interim benefits.[32] TO BE SAFE,

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[31] 42 U.S.C. § 423(g)(1990).

[32] For example, your case may involve the Secretary's denial of your application for disability benefits. The judge may order a remand and require the Social Security Administration to evaluate the evidence presented at your hearing. Or, the judge could remand your case and order the Secretary to obtain more evidence about your impairments and then hold a new hearing. With respect to these application denial cases, you would not be entitled to interim benefits while these new evaluations were being done.

YOU SHOULD REQUEST INTERIM BENEFITS IN ANY REMAND SITUATION.[33] You should also request that the judge order the Secretary to restore your benefits immediately and that s/he start this new review process within a certain stated period of time.

You must remember something important about interim benefits. If you are receiving interim benefits and have another hearing and lose that hearing, and then lose at the Appeals Council, the Secretary may try to take back or "recoup" interim benefits paid to you.[34] If, however, the Secretary tries to get back those interim benefits, you can challenge or appeal the Secretary's claim if you show 1) you were not "at fault" in receiving your interim benefits, and 2) that it would be unfair (against equity and good conscience) for the Social Security Administration to take back any money from you. "At fault" means that you received benefits to which you were not entitled by doing something wrong such as providing information to the agency that you knew was not correct, or that you accepted checks from the agency to which you knew or

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[33] If your case is remanded and is one involving a cut-off of benefits, you have the right to have your disability benefits restored temporarily until a decision is made after the new hearing and Appeals Council review. In addition, whether your case involves an application denial or benefit cut-off, if the Secretary's request for a remand is based on a lost transcript or a transcript record which can't be understood, the judge should be be asked to order the Secretary to grant you monthly benefits until after the new hearing is held and decision is made. In many cases, depending on all the facts and circumstances, such benefits are ordered.

[34] 42 U.S.C. § 404(a)(1)(1990).

should have known you were not entitled.[35] Showing that taking back all or any part of those interim benefits would leave you without enough income for ordinary and necessary living expenses (e.g., food, clothing and rent) is the type of situation which is likely to be considered "against equity and good conscience."[36]

MOTION TO DISMISS

After you have filed your complaint, the Secretary can also make a motion to dismiss your case, claiming that you filed your action more than 60 days from the date of the Appeals Council's decision or that you missed a step in the agency review process, such as failing to appeal to the Appeals Council after losing your hearing. If the Secretary makes this motion, you may answer in writing and explain why s/he is wrong and that the complaint should not be dismissed.[37]

MOTION FOR JUDGMENT ON THE PLEADINGS

You or the Secretary may also make a motion for judgment on the pleadings.[38] (See Form 2). A motion for "judgment on the

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[35] Id. at § 404 (b) (1983); 20 C.F.R. § 404.507 and 508(a) (1985); Soper v. Heckler, 754 F.2d 222, 225 (7th Cir. 1985); Viehman v. Schweiker, 679 F.2d 223, 227-28 (11th Cir. 1982); Milton v. Harris, 616 F.2d 968, 971, 973-74 (7th Cir. 1980).

[36] Hansen v. Harris, 507 F. Supp. 900, 902-03 (D.C. Ark. 1981); 20 C.F.R. §§404.508-404.509.

[37] Fed. R. Civ. P. 12(b).

[38] Id. at Rule 12(c).

pleadings" means that the party making the motion is asking the judge to review the record and to rule in his/her favor based exclusively on the complaint, answer and record filed in the case. When the Secretary makes this kind of motion, s/he is asking the court to uphold the decision which denied or terminated your benefits, because s/he claims the evidence shows you are not disabled. This is the most common motion made by the Secretary in disability cases. If you make this kind of motion, you will ask the court to reverse the Secretary's decision because it is not supported by the evidence and that, on the contrary, the evidence supports your claim that you are disabled and unable to work. [39]

HOW TO MAKE A MOTION OR REPLY TO A MOTION MADE BY THE SECRETARY

STEPS TO FOLLOW TO MAKE A MOTION

As a general rule, the court will not consider your motion until the Secretary has been served with the summons and complaint. Therefore, you should not make your motion until after the summons and complaint have been delivered. If you are unsure about what is happening in your case, pull a copy of your docket sheet from the public records room in the Court (room 10 on the ground floor) or see the Pro Se Clerk. Your docket sheet lists each and every document that has been filed with the Court. You need your docket number and judge's name when requesting your docket sheet or file.

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[39] Id.

Unlike the summons and complaint, any motion you make should be served on the U.S. Attorney only.

To make a motion, you must follow the following steps:

1. Write your motion papers. Your motion papers consist of two parts, a Notice of Motion and an Affidavit or Affirmation (motion instructions and forms are in the Appendix under Form 2):

A. Notice of Motion (Form 2) - this part states that you will "move" (make your application or request) on a certain day. This is the day the motion will be marked ready to be heard by the judge. The date you pick for the motion to be heard should be at least fifteen days <u>after</u> you have had your motion papers delivered to the U.S. Attorney's office. Some judges have special motion days, such as every Friday. If possible, check with the Pro Se Clerk's Office to find out what day the judge in your case hears motions. The Notice of Motion also contains the address where the court is located. The Notice should also include the judge's courtroom number, if you know it.

B. Affidavit or Affirmation (Form 2) - this part of the motion explains what you want the judge to do and provides the facts supporting your claim that you are entitled to have your request granted. You may also submit a memorandum of law with your motion. This contains a legal argument to support your claim and explains how the law and previous court decisions apply to the facts of your case. (See Section Two of the manual for a brief discussion of the law and certain court

decisions as they relate to the most common legal issues raised in disability cases.)

2. Deliver your motion papers to the U.S. Attorney's office. (Pages 38-41 of the manual explain how to prepare and deliver your legal papers.)

3. Attach an affirmation (or affidavit) of service (Form 3 in the Appendix) to the original papers you are filing with the court to show that you delivered the motion papers to the U.S. Attorney. (If you hand delivered the papers, the U.S. Attorney's office can stamp your original as proof of service.)

PLEASE NOTE THAT FORMS FOR THE DIFFERENT MOTIONS DESCRIBED IN THE PRECEDING SECTION ("MOTIONS") ARE INCLUDED IN THE APPENDIX OF THIS MANUAL. READ ALL THE FORMS IN THE APPENDIX CAREFULLY BEFORE PROCEEDING.

STEPS TO FOLLOW TO REPLY TO A MOTION MADE BY THE SECRETARY

1. Prepare an affidavit or affirmation in opposition to the motion. Have it typed if possible. A form and instructions are included in the Appendix (see Form 4).

2. The affidavit or affirmation may be accompanied by exhibits such as medical or hospital records, if relevant to the reason you are opposing the Secretary's motion. You can also attach affidavits or affirmations from other people having personal knowledge of relevant information. Form 4 shows the basic structure of an affidavit or affirmation in opposition to a motion.

The content of your affidavit or affirmation should depend on the facts of your case and the type of motion you are opposing.

3. You can also submit a memorandum of law to argue that the law supports your request and to explain how the law applies to the facts of your case. (See Section Two of the manual, pages 57-73 for a general discussion of the law as it relates to the most common legal issues raised in disability cases.) Any facts on which you rely must already be contained in the record in your case or be stated in an affidavit or affirmation or in an attached medical report; it is not sufficient to discuss facts in a memorandum of law without having first mentioned them in an affidavit or affirmation, or having submitted them in some previous document.

4. You must serve or deliver your opposing affidavit or affirmation to the U.S. Attorney's Office. (See pages 39-43 of the manual for complete instructions about preparing and serving your legal papers.) Attach an affirmation (or affidavit) of service (Form 3) to your original papers before filing them with the court.

5. Call the Pro Se Clerk to ask whether you are required to come to court to argue the motion. Explain that you are a pro se plaintiff in a social security disability case, that the Secretary has made a motion and you have submitted papers opposing the Secretary's motion. The Pro Se Clerk will contact the Judge's Chambers.

PLEASE NOTE THAT FORM 4 IN THE APPENDIX CAN BE ADAPTED TO RESPOND TO MANY OF THE DIFFERENT MOTIONS THAT THE SECRETARY MAY MAKE. READ THE INSTRUCTIONS FOR FORM 4 AND THE SECRETARY'S MOTION PAPERS CAREFULLY BEFORE WRITING YOUR RESPONDING PAPERS.

AFFIDAVITS

In order to make a motion asking the court to grant a specific type of remedy, you must attach a "supporting affidavit." (See the Affidavit/Affirmation included as part of Form 2 in the Appendix). A typical affidavit is a sworn written statement signed in front of a notary public in which the attorney or person making the motion states the facts and reasons why the judge should do what the individual asks in the motion.[40] For example, if the Secretary wants an extension of time (also called an "enlargement" of time) to answer your complaint, s/he will make a motion requesting more time. S/he will also usually attach an affidavit signed by the attorney handling the case stating the reason(s) why s/he needs extra time. The most common reason stated in an "extension of time" motion is that the Secretary is processing hundreds of appeals and needs more time to locate and/or transcribe the hearing record in the particular case.

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[40] Instead of filing an affidavit, you may file a document known as an affirmation. An affirmation is a written statement containing the same facts and information as an affidavit, however an affirmation need not be notarized. The difference between the two documents is not that great. The person who signs an affirmation states under penalty of perjury that the contents are true. In an affidavit, the person who signs it swears under oath that the contents are true.

In order to answer and/or object to any motion made by the Secretary, you must state your position in an opposing affidavit.[41] When preparing your affidavits or affirmations, always follow the rules for preparing legal papers that follow.

PREPARING AND SERVING LEGAL PAPERS

OVERVIEW

Whether you decide to make your own motion or submit an affidavit opposing the Secretary's motion, you should go through the following steps when putting together your papers for court.

1. Try to have any legal papers you submit to the courts typed and always include the name of the case with the docket number and judge's initials.[42] If you can't type your papers, print or write them clearly on one side of the page only. Your papers must be on 8 1/2 x 11 inch paper.

2. If you are submitting an affidavit, you should have one original and at least two copies. (The original is for the judge;

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[41] Fed. R. Civ. P. 6(d). Take again, for example, the Secretary's motion for an extension of time to answer your complaint. You can express your objections to it (if you have any) by writing and submitting your own Affidavit in Opposition. For instance, if your benefits were cut-off you can say in your affidavit that an extension of time harms you because it would further delay your case and your eventual receipt of benefits; you can suggest that if the Secretary is to receive more time to answer your complaint, then you should receive interim benefits for the time period of the requested extension. (See the Affidavit/Affirmation included as part of Form 4 in the Appendix).

[42] Joint Local Civil Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, Rule 1(a)(2)(1983).

one copy is for the Assistant U.S. Attorney and the other is for your records.)

3. Any affidavit must be signed in ink in front of a notary public. It is best to sign the original and both copies.

You can prepare and submit an "affirmation" instead of an affidavit. Your affirmation contains the same information as an affidavit except that it does not have to be signed before a notary public. Instead, there is a statement you sign at the end of the affirmation stating the facts stated in affirmation are true "under penalties of perjury." (See the sample affidavits/affirmations included as part of Forms 2 and 4 in the Appendix).

4. A copy of any legal papers that you wish the judge to read must be sent to the U.S. Attorney, the attorney who represents the Secretary.[43] (This includes any legal briefs, motions, affidavits or even letters.) In legal terms, sending copies of papers to your opponent in the case is known as "serving" him/her. For your purposes, by having your papers delivered to the U.S. Attorney's office, you serve the Secretary. (This does not apply to serving the summons and complaint which starts your case. Those rules are explained on pages 14-17.) There are two ways to have your legal papers delivered to the U.S. Attorney.

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[43] Fed. R. Civ. P. 5(a).

SERVING LEGAL PAPERS BY MAIL

You can mail a copy of your legal papers to the U.S. Attorney.[44] Mail your legal papers (motions, affidavits and/or legal briefs) to:

Otto G. Obermaier
U.S. Attorney
One St. Andrews Plaza
New York, New York 10007

(If you've already received any legal papers or correspondence from the office of the U.S. Attorney it should also include the name of the particular assistant U.S. Attorney assigned to your case. You should also include his or her name on the address when you mail anything to the U.S. Attorney's office.)

Your affidavit or affirmation of service states the date on and address to which you mailed the copy of your legal paper to the U.S. Attorney's office. You must attach the affidavit or affirmation to the original of your legal papers and then bring this original with attached affirmation or affidavit of service to the Pro Se Clerk. Your "original" is the one from which you made your copies. (See Form 3 for a sample affirmation [or affidavit] of service.)

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[44] Fed. R. Civ. P. 5(b).

The Pro Se Clerk may ask if you've served the defendant Secretary before s/he accepts your papers for filing. Once s/he sees your affirmation or affidavit of service swearing that you've served the Secretary by serving the U.S. Attorney, the clerk will accept your papers and send them to the judge assigned to your case. The clerk's office will not accept your legal papers unless you show proof that you served a copy of it on the U.S. Attorney's office.

SERVING LEGAL PAPERS IN PERSON

Another method of serving legal papers is by bringing it in person directly to the U.S. Attorney's office rather than mailing it.[45] You may not serve your summons and complaint in this manner. For cases pending in federal court in the Southern District of New York you may "serve" the copy of your papers by delivering them in person to the U.S. Attorney's office located at One St. Andrews Plaza in Manhattan. Make sure you also bring your original legal papers with you. Tell the guard in the building lobby that you are serving legal papers on the U.S. Attorney. There is a special office in the building designated to accept service of legal papers. When you deliver the copy of your papers to that office, make sure they sign and/or stamp your original copy. This stamp or signature is the equivalent of an affirmation or affidavit of service, and proves that the U.S. Attorney received a copy of your papers. Afterwards, bring the original papers to the Pro Se Clerk for filing. If the clerk asks whether you've served the Secretary,

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[45] Id.

show the clerk the stamp or signature on the original and s/he will accept them for filing.

Your affirmation or affidavit of service or the U.S. Attorney's stamp or signature is called "proof of service". Only after you've submitted your papers to the clerk's office, with "proof of service", will they be forwarded to the judge. Without this "proof of service" your papers will be rejected.

LETTERS TO THE JUDGE

If you have a request to make to the judge or a legal or factual argument you would like to present, you should try, if possible, to make it in the form of a written motion, affidavit or affirmation, or legal brief. If you are unable to do so, you can write a letter to the judge and make your point as best you can. You should address your envelope to the specific judge assigned to your case as follows:

Honorable (Judge's name)
United States District Court
Southern District of New York
U.S. Courthouse, Foley Square
New York, New York 10007

Include the name and the docket number of your case in the letter itself. You must mail a copy of the letter to the U.S. Attorney. You must also include with your letter to the judge an affidavit or affirmation stating that a copy was mailed or delivered to the U.S. Attorney's Office.

You are absolutely forbidden to go to speak to or visit the judge in person in his or her chambers or private offices. You are only permitted to speak to the judge in the courtroom on the day your case is scheduled to be heard. This rule is designed to promote fairness in the process. You would not want your opponent to be able to speak to the judge without you knowing about it. The judge will generally only speak to litigants when both sides of the case are represented and the judge will generally only consider a written submission when both sides of the case have received copies of the document. Any questions you have for the judge should be asked at a conference, made in writing or directed to the Pro Se Clerk's Office.

PART FOUR: THE STRUCTURE OF YOUR LAWSUIT

HOW YOUR CASE IS DECIDED

DECIDING THE CASE: WHAT THE JUDGE CAN DO

Normally a judge will not decide your case until either you or the Secretary makes a motion. A motion generally starts the case "moving". Of the three motions discussed earlier, a motion for judgment on the pleadings is the one which usually brings the basic issues in your case to the judge's attention. In deciding this motion, the court will discuss what was proper or improper about the type of hearing you had. The court will often decide whether the administrative law judge at your hearing and the Secretary correctly evaluated the evidence in your case.

As the court reviews your hearing record, it may also consider the seriousness of your impairments and whether or not you are disabled. The court will decide if the hearing record shows that the Secretary was correct in denying your application or terminating your benefits. The judge reviews the evidence in the case and then determines whether the Secretary's decision is based on "substantial evidence."

"Substantial evidence" is a legal test. It means that even if the District Court judge might have made a different decision in your case if s/he were the administrative law judge, the judge should not change the hearing decision if the decision was at least

reasonable, based on the evidence. This is important because different people may have different opinions about what the evidence shows and each decision could still be considered reasonable. In your case, you can try to argue to the judge that the hearing decision was not reasonable based on the evidence. The court must look at the whole record in order to decide whether the Secretary's findings were based on substantial evidence. If the Secretary based his or her decision only on one part of the record and disregarded other important evidence, then the court may reverse the Secretary's decision.[46] (Read SECTION TWO, pages 56-75, for a more complete discussion of the various legal arguments you can make in support of your claim that the Secretary's decision was wrong and should be reversed.)

If the judge has sent your case to a magistrate, the magistrate could recommend that the Secretary's decision be reversed or that it be upheld because s/he believes the record shows you are not disabled. The judge always has to review any recommendation made by the magistrate.[47] You can object to the Magistrate's Report if you believe that the record in your case clearly shows that you <u>are</u> disabled and unable to work. Your objections should be in writing, served on the U.S. Attorney's office and submitted to the clerk at

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[46] <u>McBrayer v. Secretary of Health & Human Services</u>, 712 F.2d 795, 798-99 (2nd Cir. 1983); <u>Smith v. Califano</u>, 637 F.2d 968, 970 (3rd Cir. 1981); <u>Hofacker v. Weinberger</u>, 382 F. Supp. 572, 576 (S.D.N.Y. 1974).

[47] <u>Mathews v. Weber</u>, 423 U.S. 261 (1976); <u>Pope v. Harris</u>, 508 F. Supp. 773, 776-77 (S.D. Ohio 1981).

the court within ten (10) days from the date stamped on the magistrate's report stating when it was filed in the court.[48] If you need more time to prepare your papers, call the Assistant U.S. Attorney assigned to your case and ask that s/he consent to your request for additional time to file your objections. If s/he agrees, call the Judge's chambers, identify yourself as a pro se plaintiff, and state the name of your case. Explain that the Assistant U.S. Attorney in your case has agreed to give you additional time to object to the Magistrate's Report. Ask that your extension request be granted by the judge. If the extension is granted, the clerk may tell you to send a letter to the judge confirming that your time to file objections has been extended to a particular date. A copy of all letters to the judge must be mailed to the U.S. Attorney's office. In addition, your letter to the judge must also contain a notation that a copy was mailed to the U.S. Attorney's office.

If the Assistant U.S. Attorney assigned to your case will not agree to give you more time to prepare and file objections, you must make a motion requesting that the court grant you an extension of the ten day period within which to file your objections. State in your accompanying affidavit the reason(s) why you need an extension. This motion should be made within the original ten day period. You may have actually received the Magistrate's Report more than ten days after the date stamped in the Report. In such a case, make

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[48] Fed. R. Civ. P. 72(a).

your motion for an extension as soon as possible, and include a statement in your affidavit/affirmation as to when you received the report. (Refer to Section One, Part Three, Motions, for further assistance in preparing your motion for an extension.)

Whether your case was sent to a magistrate or remained before the District Court judge, if you expect the court to reverse the Secretary's decision, the record in your case should contain doctors' and/or hospital records clearly describing your sickness or impairments. It is also helpful if your doctor also has stated in these records that s/he believes you can't work on a regular basis, and has stated the reason(s) for this conclusion.

The judge's decision in your case can do any one of the following four things:

1) affirm (uphold) the decision of the Secretary and dismiss your complaint. This occurs if the judge agrees with the decision of the Secretary and finds it was based on substantial evidence. (This kind of decision means you've lost your case.)

2) modify or change the Secretary's decision in some way but otherwise affirm it.

3) reverse the Secretary's decision and send your case back to the agency for calculation of what benefits you are due. This is

a "limited" remand and does not involve a new hearing. (This kind of decision means you've essentially won your case.)

4) remand or send your case back to the Secretary for some kind of further action, usually a new hearing.

REMANDS

The judge does not always directly decide whether you are disabled. Instead, the judge may remand your case because s/he decides that the Administrative Law Judge did not use the proper legal standard in evaluating the evidence at your hearing. For example, if you have more than one ailment or impairment, the Secretary must evaluate all of them together and look at their combined effect when deciding whether or not you are able to work.[49] The Secretary cannot look at each impairment separately and decide that, since no ailment by itself is serious enough to prevent you from working, you are not disabled. If the Secretary did not evaluate the total effect of all your impairments together, then s/he used the wrong legal standard and your case might be remanded for another evaluation of the evidence using the correct standard. In such a case, the judge would not decide that you are or are not disabled. Rather, the Secretary would be required to consider that question again using the correct standard ordered by the court.

The judge may also remand your case if you submitted new evidence

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[49] 42 U.S.C. § 423(d)(2).

of your disability to the court. If you were not represented at the hearing, your case may be remanded if the judge believes that the Administrative Law Judge did not fully gather enough evidence or fairly develop the record in your case. Additionally, your case might be remanded for a new hearing (with an opportunity for you to obtain an attorney) if the judge feels that your case was prejudiced at the hearing because you did not have an attorney represent you.

Before the judge makes a decision in your case, you can ask the court to "retain jurisdiction" of the action if the court is going to remand it to the Social Security Administration for additional proceedings. A request to "retain jurisdiction" means your case would automatically go back to the same judge if, after remand, you lose a second time at the Social Security Administration. You should include this request in your legal papers or in a separate letter to the judge. You should ask that, "if the court decides to remand your case to the agency", the judge "should include in the remand order, a statement that the court 'retains jurisdiction' of the case, or that the case shall remain on the court's 'suspense docket' or 'suspense calendar.'"

Your letter should also request that after remand, if the agency rules against you, the judge should require the U.S. Attorney's office to send you a copy of the record of the remanded proceedings (including a hearing transcript) and should also require the U.S. Attorney's office to file a copy of the record with the remanding

judge.

A decision to remand the case is neither a complete win nor a loss since it usually means a new hearing. Finally, an order of the District Court remanding a case is not appealable.

AFTER YOUR CASE IS REMANDED

After the new administrative hearing and/or proceedings, if you are not satisfied with the result, you should again appeal the hearing decision to the Appeals Council of the Social Security Administration. If you lose in the Appeals Council, you can appeal that decision to the U.S. District Court. You do not have to file a new complaint in the Pro Se Clerk's Office if your previous remand order expressly states that the remanding court retained jurisdiction of your case and/or that your case will remain on the judge's "suspense docket" or "suspense calendar." In that situation, if you lose after the Appeals Council review, your case should automatically go back to the District Court judge who handled your case before the remand.

The U.S. Attorney will send your latest social security administration record to the remanding judge and a copy to you. After receiving the supplemental administration record on your case, the court will notify you and the U.S. Attorney's office that further papers are required when the case is scheduled to be heard by the court.

If the remand order states anywhere that your case was "dismissed," you must file a new complaint in the Pro Se Clerk's Office. This complaint must be filed within 60 days from the date of the latest Appeals Council decision. When a new complaint is filed, your case will not automatically be referred to the judge who originally remanded your case.

If your remand order does not state that: 1) the court "retains jurisdiction," or that 2) your case shall remain on the "suspense calendar" and/or "docket," and 3) is silent as to whether your action was "dismissed," then you must take some action in the Pro Se Clerk's Office to appeal your case once again to the District Court level. It varies from case to case whether you must file a "motion to reopen" or file a brand new complaint in order to appeal this latest decision against you.

If you believe your appeal should return to the judge who originally remanded your case, you may file a "motion to reopen" in the clerk's office and request that the motion be referred to that judge. You should attach a copy of the remand order and latest Appeals Council decision to such a motion. However, if you do not learn that your motion to reopen has been granted before 60 days have passed from the date of the Appeals Council decision, you must file a new complaint to ensure that you do not lose your right to appeal if the judge takes longer than 60 days to rule against reopening your original case.

If you have any questions about appealing the Appeals Council's decision, take the remand order and decision to the Pro Se Clerk's Office for information about the procedures for appealing your case. Bring the Appeals Council decision, the remand order (or at least the name of the judge who remanded the case), and the docket number of the case with you when you go to the Pro Se Clerk's Office.

APPEALING FROM THE DISTRICT COURT JUDGMENT

Finally, if there is no remand -- if you simply lose your case in the District Court -- and, if you believe the judge's decision is wrong, you have the right to appeal to the Court of Appeals for the Second Circuit. The Court of Appeals is the next highest appeals court.

In order to begin an appeal to the Second Circuit, you must file a Notice of Appeal with the Clerk of the District Court.[50] This notice must be filed within 60 days from the date of the District Court's entry of the final judgment.[51] (Under some special circumstances the judge can extend this time period for an additional 30 days, but don't rely on that.)[52] A notice of appeal form is available from the Pro Se Clerk of the District Court.

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[50] Fed. R. App. P. 3(a).

[51] Id. at Rule 4(a)(1).

[52] Id. at Rule 4(a)(5).

Your completed notice of appeal form must be submitted to the Pro Se Clerk's Office. If you filed your case in forma pauperis in the District Court, you will not need to ask the Court of Appeals for permission to appeal in forma pauperis, as long as the District Court has not revoked your pauper status. However, if you had to pay the filing fee in the District Court, you will need to either pay a $105.00 fee for the appeal or move for in forma pauperis status.

The Court of Appeals also has a Pro Se Clerk who can answer questions and help you through the procedure for this appeal.

GENERAL INFORMATION ABOUT TERMINATION CASES OCCURRING BETWEEN 1976 AND 1984 AND CERTAIN APPLICATION DENIAL CASES OCCURRING BETWEEN 1980 AND 1984 WHICH DID NOT REACH THE COURT LEVEL

Three disability cases were decided which affect various practices and proceedings of the Social Security Administration involving termination of benefits and application denial cases. These are known as the "City of New York," "Dixon" and "Schisler" decisions.[53] As a result of these court decisions, most disabled individuals who were receiving benefits and later had their benefits cut-off between 1980 and 1984 now have the right to have

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[53] City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y. 1984), aff'd, 742 F.2d 729 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986); Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y.), aff'd, 785 F.2d 1102 (2d Cir. 1984); Schisler v. Heckler, 574 F. Supp. 1538 (W.D.N.Y. 1983), aff'd in part, rev'd in part, 787 F.2d 76 (2d Cir. 1986).

these decisions reviewed.[54] In addition, those individuals whose applications for disability benefits were denied between 1980 and 1984 also have the automatic right to have their applications reconsidered by the Secretary.[55]

TERMINATION CASES

At the time the Secretary was ordered to change her procedures, people who had previously had their benefits cut-off had cases in various levels of the appeals process; some individuals had even failed to go through all the various steps in the Social Security appeals process. The new Social Security Disability Benefits Reform Act and court decisions made provisions as to how all termination cases would be affected, no matter where these cases stood in the administrative appeals process.

Moreover, any New York resident who was cut-off from federal disability benefits any time after June 1, 1976 now has the right to another review of that old termination decision.[56] (This rule does not apply if you appealed your previous cut-off of benefits to the District Court and lost that case.)

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[54] Id.

[55] Id.

[56] Schisler v. Heckler, 107 F.R.D. 609, 614 (S.D.N.Y. 1984), aff'd in part, rev'd in part, 787 F. 2d 76 (2d Cir. 1986).

Most former recipients of disability benefits who were cut-off and are now entitled to a new review of that termination decision have already received written or telephone notice from the Social Security Administration explaining their right to another review. If you had your disability benefits cut-off at any time from June, 1976 to the present date and have not requested a review of that decision and restoration of benefits, go to your local Social Security office as soon as possible to request the new review and your interim benefits.

APPLICATION DENIALS

Many New York residents who filed applications for disability benefits between 1980 and 1984 but were denied can have these decisions reviewed again. If those new reviews conclude that the person is disabled, retroactive benefits will be paid starting from the date of the original application. With respect to previous application denials, you don't have the right to receive benefits while the new review is occurring. You receive your benefits only if the Social Security Administration decides you are disabled or you eventually win your case in court.

Not everyone who has had his application denied since 1980 is entitled to an automatic review. (Most individuals who are entitled probably have already been so notified.) However, if your application for disability benefits was denied and you are not sure whether your case fits into the category of those entitled to

another review, see the description that follows.

You are entitled to reconsideration of your old application denial if:

1. After July 20, 1983, your application was denied because the Social Security Administration said your impairment was "not severe." If you re-apply and win, you will receive benefits back to the date of the denial.[57]

2. You have a mental impairment and Social Security denied your application between March 1, 1981 and September 19, 1984 because they decided your mental impairment was "not severe." If you re-apply and win, you should receive benefits back 12 months prior to the date of the application.[58]

3. Your application was denied between April 1, 1980 and May 15, 1983 because Social Security on one hand agreed your mental impairment was severe but, on the other hand, said it still wasn't disabling. If you win your re-review, you will receive benefits back to the date of the original denial.[59]

If you believe you fall into one of the above categories, and have not yet requested review of the earlier denial of benefits, go to your local Social Security office and say that you want a review of the earlier denial under Dixon, City of New York or the Reform Act. If you still are not clear about your rights under these cases or the Reform Act, contact your nearest Legal Aid or Legal Services office for assistance.

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[57] Dixon v. Heckler, 589 F.Supp. 1494, 1500, 1511-12 (S.D.N.Y.), aff'd, 785 F. 2d 1102 (2d Cir. 1984).

[58] Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98th Cong., 2nd Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 1798, 1802 and H.R. Rep. No. 98-1059, 98th Cong. 2d. Sess., reprinted in 1989 U.S. Code & Ad. News 3080, 3089.

[59] Id. at 3082 and City of New York v. Heckler, 578 F. Supp. 1109, 114-15 and 1125 (E.D.N.Y.), aff'd, 742 F. 2d 729 (2d Cir. 1984), aff'd, 476 U.S. 467 (1986).

SECTION TWO: YOUR LEGAL ARGUMENTS

OVERVIEW

There are many reasons why Social Security may have turned you down improperly. You have the opportunity to explain to the judge, in writing, why you believe Social Security was wrong. The following are some legal arguments that can be made in Social Security cases. Read them carefully to see if any of them relate to your case. If an argument does apply to your case, you may include the names and numbers of the relevant court decisions given in the footnotes at the bottom of each page in this section. These will help the judge in your case decide whether your claims are correct.

BURDEN OF PROOF

As the claimant, it is your job (you have the "burden of proof") to convince the Social Security Administration (and the court) that your condition keeps you from doing past relevant work (any job you have had during the past fifteen years).[60] That is all you must do. The burden then shifts to the Social Security Administration. This means that it becomes Social Security's job to show that, even though you cannot do your former job any longer, you can do other work. [61]

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[60] Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 642 (2d Cir. 1983).

[61] Aubeuf v. Schweiker, 649 F.2d 107, 112 (2d Cir. 1981).

Look at the record. Explain to the judge exactly what evidence shows that you can no longer meet the physical, mental or emotional demands of your former job. If Social Security did not come up with other work you could do, either a specific job or a specific category of job (sedentary, light, or medium work), then Social Security did not satisfy its burden and was incorrect in deciding that you were not disabled.

SPECIFIC LEGAL ARGUMENTS THAT YOU CAN MAKE

THE SOCIAL SECURITY ADMINISTRATION IMPROPERLY IGNORED THE TREATING PHYSICIAN'S REPORT.

Look for the copy of your doctor's report in the record. That report is very important. Does it say that you are unable to work? If it does, look for the reports from Social Security's doctors. If Social Security did not send you to any of their doctors, then your doctor's report will be the only report in the file, and it will be uncontradicted. Social Security is required to follow an uncontradicted medical report from the treating physician.[62]

Because your doctor's report is so important, you must be sure that your doctor has given a report. If your Social Security record

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[62] Schisler v. Bowen, 851 F.2d 43 (2d Cir.), modified, 1988 U.S. App. Lexis 13197 (2d Cir. 1988); Hidalgo v. Bowen, 822 F.2d 294 (2d Cir. 1987).

does not contain a report from your doctor, then you should ask your doctor for a report and submit that report to the judge. Your doctor's report should explain what health problems you have, in as much detail as possible, and how those health problems keep you from working, also in as much detail as possible.

If there are reports from Social Security's doctor or doctors who examined you, read them carefully. Do those reports say there is something wrong with your health? If they do, do the reports say whether or not you can work? Sometimes Social Security's doctors will include an opinion in their reports as to whether or not you can work, but often they will simply comment on your medical condition without giving an opinion on your ability to work. If the Social Security doctor says that you do have an illness or injury, but does not give any opinion as to your ability to work, then your doctor's report (saying that you cannot work) is still uncontradicted, and Social Security must accept your doctor's report and give you benefits.

But please note, other medical information in your file such as hospital or clinic records, or even statements from witnesses who have observed you, may contradict your doctor's report. If it does, then the Social Security Administration (and the federal judge) is not required to accept your doctor's conclusion that you are disabled, but must consider your doctor's opinion along with all the other evidence in deciding whether you are disabled.

If Social Security's doctor disagrees with your doctor, your doctor's opinion is still more important and carries more weight legally than the opinion of a doctor who has only seen you once.[63]

If the Social Security Administration disagrees with your doctor's opinion, it must give clear and convincing reasons for the disagreement.[64] Failure to do so is a legal error.

There may also be a report or reports in your file from a doctor you have never seen. This doctor is a review physician, hired by the Social Security Administration to look over all the medical records and reports in your file and give his or her opinion as to whether or not you can work. Social Security relies on these reports. The courts, however, find them to be virtually worthless.[65] Therefore, if Social Security has relied exclusively on the opinion of a doctor who never saw you, the judge may find the Secretary made a mistake.[m] .

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[63] Schisler v. Bowen, 851 F.2d 43 (2d Cir.), modified, 1988 U.S. App. Lexis 13197 (2d Cir. 1988).

[64] Day v. Weinberger, 522 F. 2d 1154, 1156-57 (9th Cir. 1975); See Ferraris v. Heckler, 728 F.2d 582, 587 (2d Cir. 1984); Fiorello v. Heckler, 725 F.2d 174, 176 (2d Cir. 1983); Kent v. Schweiker, 710 F.2d 110, 115-16 (3rd Cir. 1983).

[65] Schisler v. Bowen, 851 F.2d 43 (2d Cir.), modified, 1988 U.S. App. Lexis 13197 (2d Cir. 1988); Hidalgo v. Bowen, 822 F.2d 294 (2d Cir. 1987).

THE ADMINISTRATIVE LAW JUDGE FAILED TO MAKE A FULL AND FAIR INQUIRY INTO THE FACTS

When a person has a Social Security hearing without an attorney,[66] the Administrative Law Judge (ALJ) is legally required to help that person collect all evidence which is helpful to the case.[67] Look at the transcript of your hearing. Were you allowed to explain to the ALJ all the important facts about your condition? If you were not, if there is information that is missing, put it in writing to the federal judge.

In addition, the ALJ must help you "develop your case" if you have no lawyer. This means that the ALJ must find out who your doctors are and ask your doctors for reports on your health.[68]

If you have been treated at a hospital or clinic, the ALJ must try and get copies of your clinic or hospital records.[69] Look at the record in your case. Does it contain reports from all your doctors? From all the hospitals or clinics where you have been

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[66] This includes people who had representatives at the hearing but whose representatives were not attorneys.

[67] Hankerson v. Harris, 636 F.2d 893, 895-96 (2d Cir. 1980); Rodriguez v. Schweiker, 520 F.Supp. 666, 672 (S.D.N.Y. 1981).

[68] Eiden v. Secretary of Health, Education and Welfare, 616 F.2d 63, 65 (2d Cir. 1980); Hankerson v. Harris, 636 F.2d 893, 895-96 (2d Cir. 1980); Cutler v. Weinberger, 516 F. 2d 1282, 1286 (2d Cir. 1975).

[69] Schisler v. Bowen, 851 F.2d 43, 46-47 (2d Cir.), modified, 1988 U.S. App. Lexis 13197 (2d Cir. 1988).

treated for your condition? If not, Social Security was wrong, and you should inform the federal judge, in writing, of which reports or records are missing.

Now look at the ALJ's decision. Did the ALJ say that your doctor's report was no good because it was too short, because it was confusing, because it did not contain laboratory data, specific findings, or was otherwise insufficient? This is wrong. If the ALJ thinks your doctor's report is inadequate (and you weren't represented by a lawyer), the ALJ should write to your doctor and ask your doctor to clarify or elaborate the report.[70] At the least, the ALJ should have told you at your hearing that your doctor's report was insufficient and should have given you the opportunity to get a more detailed report from your doctor.[71]

THE SOCIAL SECURITY ADMINISTRATION'S DECISION WAS NOT BASED UPON SUBSTANTIAL EVIDENCE.

The federal judge must decide in favor of Social Security, and against you, if Social Security's decision was based upon "substantial evidence." What this means is that the evidence must be "such as a reasonable mind might accept as adequate."[72] While that standard is somewhat vague, it means that the federal judge

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[70] Schisler v. Bowen, 851 F.2d 43 (2d Cir.), modified, 1988 U.S. App. Lexis 13197 (2d Cir. 1988).

[71] Hankerson v. Harris, 636 F.2d 893, 895-96 (2d Cir. 1980).

[72] Richardson v. Perales, 402 U.S. 389, 401 (1971).

must look at all the evidence in [the] record and must rule in your favor if "the totality of the record would compel any fair-minded person to conclude that [you] cannot work."[73]

Look through the record. Make a list of every piece of information that supports your case (and the page on which it is printed). Explain to the federal judge how any fair-minded person reading this information would have to find you disabled. In particular, you should point out to the federal judge any pieces of information which are helpful to your case, but which the ALJ did not mention in his or her decision. The ALJ must explain why she/he has rejected evidence in your favor.[74]

THE SOCIAL SECURITY ADMINISTRATION IMPROPERLY EVALUATED TESTIMONY ABOUT PAIN.

The general rule is that pain will be called "disabling," if it is proven by some medical evidence of a condition that can cause pain (such as arthritis, heart disease, asthma, neurological problems, etc.).[75] Look at the ALJ's decision. It may say something like: "The claimant's claims of disabling pain were not supported by

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[73] Singletary v. Secretary of Health, Education and Welfare, 623 F.2d 217, 219 (2d Cir. 1980).

[74] Fiorello v. Heckler, 725 F.2d 174, 176 (2d Cir. 1983); Varela v. Secretary of Health and Human Services, 711 F.2d 482, 485 (2d Cir. 1983); Stewart v. Secretary of Health, Education and Welfare, 714 F.2d 287, 290 (3rd Cir. 1983); Quinones v. Secretary of Health and Human Services, 567 F. Supp. 188, 191 (E.D.N.Y. 1983).

[75] Green v. Schweiker, 749 F.2d 1066, 1070-71 (3d Cir. 1984).

objective medical evidence." This is legally incorrect. It is not necessary that the pain be proven by medical evidence.[76] All that is necessary is that there is some medical evidence that you have a condition that normally causes some pain. (Be sure to point out to the judge what that evidence is, and the page number where it appears).

The ALJ's decision may also say something like, "during the hearing the claimant was able to stand and rise without difficulty;" or "the claimant sat through the hearing without signs of discomfort." These statements are legally improper. They are commonly referred to as the "sit and squirm" test, meaning that the ALJ was watching you during the hearing to see if you squirmed with pain. ALJ's are not allowed to consider whether or not you squirmed or appeared to be comfortable or uncomfortable during the hearing.[77] The ALJ may not consider your ability to do minimal daily tasks, for brief periods of time, in deciding whether you are really in pain. You do not have to be completely helpless,[78] or "vegetating in a dark

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[76] Donato v. Secretary of Health and Human Services, 721 F.2d 414, 419 (2d Cir. 1983); Rivera v. Schweiker, 717 F.2d 719, 724 (2d Cir. 1983).

[77] Rivera v. Schweiker, 717 F.2d 719, 724 (2d Cir. 1983); Tyler v. Weinberger, 409 F.Supp. 776, 789 (E.D. Va. 1976).

[78] Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38 (2d Cir. 1972).

room, excluded from all forms of human and social activity,"[79] in order to get disability benefits. Therefore, you can be considered disabled even if you sometimes ride the bus or subway;[80] if you do some walking, shopping or driving;[81] or if you occasionally do household chores, care for children, and use mass transit.[82]

Some evidence will help your claim of disabling pain. First, the fact that you are taking pain medication.[83] Second, the fact that you worked for many years and quit or were fired because you could no longer work.[84] Third, the fact that your lifestyle is very restricted because of your pain.[85]

THE SOCIAL SECURITY ADMINISTRATION FAILED TO CONSIDER THE COMBINATION OF IMPAIRMENTS.

If you have more than one medical problem that affects your ability to work, Social Security must consider the combined effect of all

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[79] Andrews v. Heckler, 573 F. Supp. 1089, 1093 (E.D. Pa. 1983) citing Smith v. Califano, 637 F. 2d 968, 971-72 (3r Cir. 1981).

[80] Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 643 (2d Cir. 1983).

[81] Aubeuf v. Schweiker, 649 F.2d 107, 113 (2d Cir. 1981).

[82] Leftenant v. Schweiker, 543 F. Supp. 989, 993 (S.D.N.Y. 1982).

[83] Carter v. Heckler, 712 F.2d 137, 142 (5th Cir. 1983).

[84] Rivera v. Schweiker, 717 F.2d 719, 725 (2d Cir. 1983).

[85] Ghazibayat v. Schweiker, 554 F. Supp. 1005, 1010 (S.D.N.Y. 1983).

your problems in deciding whether you can work.[86] If you have a problem that limits your ability to work but doesn't completely disable you, Social Security must still consider that problem in combination with all your other problems, in deciding whether you are disabled. The ALJ must state specifically how the combination of your problems affects your ability to work.[87]

Start with your worst problem first. Explain to the judge how that limits you, making references to information and page numbers in the record wherever possible. Explain what, if anything, you could still do if this were your only medical problem. Now explain your second condition. Tell the federal judge how that second condition further limits the few things that you can do despite the first condition. Continue your explanation for all other conditions, showing the federal judge how all these problems together make it impossible for you to work.

THE SOCIAL SECURITY ADMINISTRATION IMPROPERLY EVALUATED RESIDUAL FUNCTIONAL CAPACITY.

Social Security's method of deciding whether you can do work which is easier than your former job (see BURDEN OF PROOF, p. 61) begins

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[86] DeLeon v. Secretary of Health and Human Services, 734 F.2d 930, 937 (2d Cir. 1984); Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 42 (2d Cir. 1972).

[87] Bowen v. Heckler, 748 F.2d 629, 634-35 (11th Cir. 1984).

by evaluating your "residual functional capacity" (RFC).[88] This is a measure of how much you can exert yourself despite your medical problems. For people with physical problems, Social Security decides how much you can lift and carry, and how long you can sit, stand and walk, in figuring out your RFC.[89] These abilities are medical conclusions, and must be made by a doctor. The ALJ is not a doctor, and is not competent to make a medical judgment.[90] While the ALJ may choose between two or more different doctors' opinions on your ability to lift, carry, sit, stand and walk, s/he may not come to his/her own conclusions as to your abilities in these areas. If the ALJ drew conclusions different from those made by a doctor, then the ALJ incorrectly substituted his or her medical judgment for the judgment of a doctor.

There are four different RFC's for people with disabilities:

A. Sedentary Work requires the ability to sit for "long periods of time,"[91] that is, at least six hours out of an eight-hour day.[92] It also requires the ability to lift up to ten

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[88] 20 C.F.R. § 404.1545 (1985) and Social Security Disability Reform Act of 1984, H.R. Rep. No. 98-618, 98th Cong. 2d. Sess., reprinted in U.S. Code Cong. & Ad. News 3038, 3044.

[89] Id.

[90] Wallace v. Secretary of Health and Human Services, 722 F.2d 1150, 1155 (3d Cir. 1983); Van Horn v. Schweiker, 717 F.2d 871, 874 (3d Cir. 1983).

[91] Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 643 (2d Cir. 1983); 20 C.F.R. § 404.1567(a)(1985).

[92] Ferraris v. Heckler, 728 F.2d 582, 587 n.3 (2d Cir. 1984).

pounds occasionally. A person who can sit for only three hours a day cannot do sedentary work.[93] Neither can a person who can sit for four hours a day and stand for four hours a day.[94]

B. Light Work requires the ability to stand for six hours a day, lift up to 20 pounds, and frequently lift or carry up to 10 pounds.[95]

C. Medium Work requires the ability to stand for eight hours a day, lift up to 50 pounds, and frequently lift or carry up to 25 pounds [96]

D. Heavy Work requires the ability to stand for 8 hours a day, lift up to 100 pounds, and frequently lift or carry up to 50 pounds.[97]

If your abilities do not match what the ALJ said your abilities were, then you should explain to the federal judge how the ALJ was wrong.

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[93] Coleman v. Heckler, 572 F. Supp. 1089, 1090-91 (D. Col. 1983).

[94] Gibson v. Heckler, 762 F.2d 1516 (11th Cir. 1985).

[95] SSR 83-10; 20 C.F.R. §404.1567(b)(1989); Townley v. Heckler, 748 F.2d 109, 113 (2d Cir. 1984).

[96] 20 C.F.R. §404.1567(c)(1989).

[97] 20 C.F.R. §404.1567(d)(1989).

THE SOCIAL SECURITY ADMINISTRATION IMPROPERLY APPLIED THE GRIDS.

A decision of disability may not be based only on medical factors.[98] Instead, Social Security must also look at a person's age, education and prior work experience.[99] This means that some people who can no longer do their jobs, but have the physical ability to do some kind of work, will still be found disabled because of their advanced age, lack of education, and lack of work skills.

Social Security has a series of tables, known as "grids," which determine whether a person who has the strength to do some kind of work will still be found disabled. A person whose impairments affect only the ability to sit, stand, walk, lift, or carry will be placed in a category on the grid, and the grids will determine whether or not that person is disabled.[100] All other conditions are considered non-exertional, and a person who has non-exertional problems, such as allergies, vision or hearing deficiencies, skin problems or mental problems may not be evaluated on the grid.[101] If Social Security used the "grids," or "Table II" in your case, and you have any significant non-exertional problems (i.e. problems that exist whether or not you exert yourself), then Social Security

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[98] Townley v. Heckler, 748 F.2d 109, 113 (2d Cir. 1984).

[99] 20 C.F.R. Part 404, Subpart P, App. 2 (1989).

[100] Heckler v. Campbell, 461 U.S. 458, 460-62 (1983).

[101] Francis v. Heckler, 749 F.2d 1562, 1566-67 (11th Cir. 1985); Kail v. Heckler, 722 F.2d 1496, 1498 (9th Cir. 1984).

was wrong. The ALJ should have asked a vocational expert to testify as a witness at your hearing.[102] That expert would know exactly what was wrong with you and what your past work required. Based on your own experiences, that expert could say whether or not you can work. In addition, the grids may not be used if you cannot do the full range of work in a particular RFC; for example, if you cannot do the full range of light work because you can lift 20 pounds but cannot stand six hours.[103]

The grids require a finding of disability if, and only if, you can no longer do your former job and if you fall into one of the following categories:[104]

1. You are physically able to do sedentary work and you are:

a. 50 years old or more, did not complete high school and, during the past 15 years, did either no work, unskilled work, or skilled work which cannot be transferred to other jobs; or

b. 50 years old or more, high school graduate with no vocational training and, during the past 15 years, did either no work, unskilled work, or skilled work which cannot be transferred to other jobs; or

c. 45 years old or older, illiterate or unable to speak English, and did unskilled or no work during the past 15 years.

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102 Bapp v. Bowen, 802 F. 2d 601, 603 (2d Cir. 1986).

103 Hammond v. Heckler, 765 F.2d 424, 426 (4th Cir. 1985).

104 20 C.F.R. § 404, Subpart P, App. 2 (1989).

2. You are physically able to do light work and you are:

a. 55 years old or more, did not complete high school and, during the past 15 years, did either no work, unskilled work, or skilled work which cannot be transferred to other jobs; or

b. 55 years old or more, high school graduate with no vocational training and, during the past 15 years, did either no work, unskilled work, or skilled work which cannot be transferred to other jobs; or

c. 50 years old or more, illiterate or unable to speak English, and did unskilled or no work during the past 15 years.

3. You are physically able to do medium work and you are:

a. 60 years old or more, only a few years of education, and previously did unskilled or no work; or

b. 55 years old or more, did not complete high school, and did not work during the past 15 years.

THE LACK OF AN ATTORNEY PREJUDICED THE CASE

Every Social Security claimant has the right to bring an attorney to the hearing.[105] It can be very important to have an attorney at a Social Security hearing.[106]

Because the right to an attorney is so important, the ALJ must tell

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[105] 42 U.S.C. §406(a)(1983 & Supp. 1990); 20 C.F.R. §§ 404.949-50 (1989).

[106] Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970); See Cutler v. Weinberger, 516 F.2d 1282, 1286 (2d Cir. 1975).

you of your right to bring an attorney with you to your hearing.[107]

The ALJ must not only tell you of the importance of having an attorney, s/he must also tell you that there are free legal services available if you cannot afford an attorney.[108]

Look at the transcript in your case. Did the ALJ tell you that you had a right to bring an attorney with you, that it is important to have an attorney with you and that, if you cannot afford an attorney, there is free legal assistance available? If not, the ALJ made a mistake, and you may ask the federal judge to send your case back to Social Security for a new hearing, at which time you can find an attorney to represent you.

THERE IS NEW AND MATERIAL EVIDENCE WHICH WAS OMITTED FOR GOOD CAUSE.

Normally, the federal judge may not accept additional evidence, such as hospital records, medical reports or statements, from you or your witnesses. The federal judge must decide your case based upon what appears in the record. However, if you have new evidence to submit which is material, and you have a good reason for not having submitted it to the ALJ, you may submit the evidence to the federal judge. The federal judge may then send your case back to

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[107] Echevarria v. Secretary of Health and Human Services, 685 F.2d 751, 756 (2d Cir. 1982).

[108] Singleton v. Schweiker, 551 F.Supp. 715, 721 (E.D. Pa. 1982); Brooks v. Califano, 440 F.Supp. 1341, 1345 (D. Del. 1977), aff'd, 586 F.2d 834 (3d Cir. 1978); Saldana v. Weinberger, 421 F. Supp. 1127, 1132 (E.D. Pa. 1976).

Social Security in order for it to decide whether the new evidence proves that you are disabled.[109]

There may be a good reason why evidence might not have been submitted at a hearing. For example, (1) You were not represented by an attorney at the hearing; [110] or (2) the evidence did not exist at the time of the hearing.[111]

Sometimes, you may have evidence, such as a report from your doctor, which is not really new because it contains no new information. Instead, the evidence may clarify information already in the file. In such a case, the judge might consider the new evidence and not simply send your case back to Social Security.[112]

OTHER LEGAL ARGUMENTS

The previous arguments are the ones most commonly raised in Social Security cases. There are a number of others which may apply to your case. They are listed below without detailed explanation.

1. The ALJ obtained evidence after the hearing and did not

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[109] Tirado v. Bowen, 942 F. 2d 595, 597 (2d Cir. 1988).

[110] Webb v. Finch, F. 2d 1179, 1179-80 (6th Cir. 1970); Rivera v. Secretary of Health, Education and Welfare, 513 F. Supp. 194, 200 fn. 8 (S.D.N.Y. 1981).

[111] Fazio v. Heckler, 750 F. 2d 541, 542-43 (6th Cir. 1984); Rodriguez v. Schweiker, 520 F. Supp. 666, 674 (S.D.N.Y. 1981).

[112] Vargas v. Secretary of Health and Human Services, 898 F. 2d 293 (2d Cir. 1990).

let the claimant see it.[113]

2. The ALJ failed to consider the claimant's allergies or breathing disorders in deciding what work the claimant could do.[114]

3. The ALJ failed to consider the side effects of the claimant's medication.[115]

4. The ALJ failed to consider prior findings of disability[116] or findings of disability made by other government agencies.[117]

OUTCOME OF THE CASE

If the judge affirms the decision of the Social Security Administration, that means that you have lost. There are two different ways in which the judge can decide in your favor. On the one hand, the judge can remand the case for a new hearing. A judge might remand the case if Social Security made a mistake in the way they considered the evidence or in not collecting enough evidence.

On the other hand, the judge can reverse and order the Social Security Administration to pay you benefits if s/he believes the evidence in your case clearly shows you are disabled and no purpose

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[113] Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984); Gullo v. Califano, 609 F.2d 649, 650 (2d Cir. 1979).

[114] Allen v. Secretary of Health and Human Services, 726 F.2d 1470, 1472-73 (9th Cir. 1984); Martin v. Heckler, 748 F.2d 1027, 1032-36 (5th Cir. 1984).

[115] Green v. Schweiker, 749 F.2d 1066, 1068 (3rd Cir. 1984).

[116] Mimms v. Heckler, 750 F.2d 180, 185 (2d Cir. 1984).

[117] Hankerson v. Harris, 636 F.2d 893, 896-97 (2d Cir. 1980).

would be served by remanding the case for a new hearing.[118] If you have satisfied your burden of proving that you cannot do your former job and the Social Security Administration has not satisfied its burden of showing that you can do other work, the court may reverse and award you benefits.[119] Also, if the federal judge finds that the Social Security Administration's decision was not supported by substantial evidence, the judge may reverse that decision and award you benefits.

The major advantage of a reversal over a remand is that you get your benefits immediately. This avoids the "often painfully slow process by which disability determinations are made."[120]

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[118] Sharrah v. Secretary of Health and Human Services, 747 F.2d 457, 459 (8th Cir. 1984); Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 644 (2d Cir. 1983).

[119] Bogard v. Heckler, 763 F.2d 361, 363 (8th Cir. 1985); Ferguson v. Schweiker, 765 F.2d 31, 37-38 (3d Cir. 1985).

[120] Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 644 (2d Cir. 1983).

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APPENDIX

FORM 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____ (Your name and Social Security number)	:	
Plaintiff,	:	
-against-	:	COMPLAINT
Secretary, Department of Health & Human Services,	:	
Defendant.	:	

Plaintiff respectfully alleges:

1. This is an action seeking court review of the Bureau of Hearings and Appeals' decision pursuant to Section 205(g) of the Social Security Act, as amended (42 U.S.C. § 405(g)).

2. Plaintiff resides at _____

_____

_____.

3. Defendant is the Secretary of the Department of Health & Human Services, and as such, has full power and responsibility over disability benefits under the Social Security Act, as amended.

4. Plaintiff should have been entitled to receive (or continue to receive) disability benefits because of the following disability

_____

_____.

This disability began on this date:_____.

5. Circle letter A, B, or C, whichever is applicable, and fill in the appropriate blanks:

A. If you were granted disability benefits but disagree with the amount, circle this letter and complete this question:

Plaintiff was found disabled by the Social Security office on _____. This disability was found to have begun on _____ [date of disabling condition] and plaintiff was granted disability benefits which started on _____ _____ [date of first payment].

B. If you were granted disability benefits but these were later terminated or reduced, circle this letter and complete this question:

Plaintiff was found disabled by the Social Security office on _____. This disability was found to have begun on _____ [date of disabling condition] and plaintiff was granted disability benefits which started on _____ [date of first payment]. Subsequently, plaintiff's benefits were terminated/reduced [cross out one] effective _____[date of termination or change].

C. If your initial application for disability benefits was denied, circle this letter.

The Bureau of Disability Insurance of the Department of Health & Human Services disallowed plaintiff's application upon the ground that plaintiff failed to establish a period of disability and/or upon the ground that plaintiff did not have an impairment or combination of impairments of the severity prescribed by the pertinent provisions of the Social Security Act to establish a period of disability or to allow disability insurance benefits, or

did not allow full benefits retroactive to the date of initial disability.

6. Subsequent thereto, plaintiff requested a hearing and on _____ [date], a hearing was held which resulted in a denial of plaintiff's claim on _____[date], or in a finding of disability at a date later than plaintiff's claimed date of disability.

7. Thereafter, plaintiff requested a review by the Appeals Council, and after its consideration, the decision of the hearing examiner was affirmed or reversed in part [cross out one] on _____ [date]. Plaintiff received this on _____ _____ [date].

8. The decision of the hearing examiner, as affirmed by the Appeals Council, was wrong, not supported by substantial evidence on the record, or contrary to the law because _____

_____

_____

_____

_____

_____

_____.

WHEREFORE, plaintiff respectfully prays that:

(a) A summons be issued directing defendant to appear before the court;

(b) Defendant be ordered to submit a certified copy of the transcript of the record, including evidence upon which the

findings and decision complained of are based;

(c) Upon such record, this court should modify the decision of the defendant to grant monthly maximum insurance benefits to the plaintiff, retroactive to the date of initial disability, or in the alternative, remand to the Secretary for reconsideration of the evidence; and,

(d) For such further relief as may be just and proper under the circumstances of this case.

_____
Signature

_____
Address

_____

_____

_____
Telephone

FORM 2

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. 10007

RAYMOND F. BURGHARDT
CLERK

INSTRUCTIONS FOR PREPARING A MOTION

Except for certain kinds of motions, the Court cannot grant your motion until the defendants have been served with the summons and complaint. Therefore, you should not make most motions until after the defendants have been served with the summons and complaint. If in doubt, see the Pro Se Clerk.

To make a motion, you must follow the following steps:

1. Write your motion papers. These consist of two parts:
   a. a notice of motion
   b. an affidavit or affirmation explaining why you are seeking and why you are entitled to the relief. You may also submit a memorandum of law.
2. Serve the papers by mail on the defendants or (if the defendant's attorney has filed papers in the case already) on the defendant's attorney. If there is more than one defendant, they all must be served.
3. Send your motion papers to the pro se clerk with an affirmation of service. (form annexed)

When you write your motion papers, you should include the following:

The notice of motion should say that you will "move" on a certain day. This is the day the motion will be marked ready for decision by the judge. It should be at least thirteen days after you have served the defendants with the motion papers.

Some judges have special motion days. If possible, check with the pro se clerk's office to find out what day this is. Also try to find out the judge's courtroom number. If this is not possible, you may leave these blank, and the judge may accept the motion papers anyway. However, he or she is not obligated to do so.

Remember that you can be prosecuted for perjury if your affirmation or affidavit is false.

If you have any questions, contact the pro se clerk's office at (212) 791-0165 (no collect calls).

FORM FOR NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

Notice of Motion

_____Civ._____( )

-against-

_____X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit or affirmation of _____, sworn to or affirmed _____, 19___ and upon the complaint herein, plaintiff will move this court, _____, U.S.D.J., in room ____, United States Courthouse, Foley Square, New York, New York 1007, on the ____ day of _____, 19___, at _____ or as soon thereafter as counsel can be heard, for an order pursuant to rule _____ of the Federal Rules of Civil Procedure granting _____ (state what you want the court to order) _____

_____

Dated: [county], New York

[date]_____

[your signature]
[print your name]
plaintiff pro se
[print your address]

TO: [put the name and address of each defendant's attorney]

FORM AFFIDAVIT/AFFIRMATION
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
_____X

Plaintiff,

AFFIDAVIT/AFFIRMATION

-against-

Defendants.

_____X

STATE OF NEW YORK)
COUNTY OF [county where you are])SS.:

[your name]_____, [being duly sworn] deposes and says [or: makes the following affirmation under the penalties of perjury]:

I, [your name]_____, am plaintiff in the above entitled actin, and respectfully move this court to issue an order [specify what you want the court to order]_____.

The reason why I am entitled to the relief I seek is the following: _____

_____

_____

_____

_____

_____

WHEREFORE, I respectfully request that the court grant the within motion, as well as such other and further relief and may be just and proper.

Sworn to before me this
day of ____, 19___

[your signature]
print you name

_____

OR: I declare under penalty of perjury that the foregoing is true and correct.

Executed on [date]

[your signauture]
print your name

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

-v-

Affirmation of Service
____ Civ. _____ ( )

---X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

whose address is: _____

_____.

Dated: _____
New York, New York

_____
Signature

_____
Address

_____
City, State & Zip Code

FORM 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

-v-

Affirmation of Service
____ Civ. _____ ( )

----------X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

whose address is: _____

_____.

Dated: _____
New York, New York

_____
Signature

_____
Address

_____
City, State & Zip Code

FORM 4

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, NY 10007

RAYMOND F. BURGHARDT
CLERK

INSTRUCTIONS FOR OPPOSING A MOTION

1. Prepare an affidavit or affirmation in opposition to the motion. A form is attached to these instructions. DO NOT USE THIS FORM AS YOUR AFFIDAVIT OR AFFIRMATION. The form is only provided as a guide. You should draft your own affidavit or affirmation.

   An affirmation is a statement which is made under penalty of perjury. An affidavit is sworn to before a licensed notary public of the state. When using the form, be certain to strike any terms which do not apply to the type of statement you are submitting.

2. The affidavit or affirmation should be accompanied by any relevant exhibits. You can also attach affidavits or affirmations from other people having personal knowledge of relevant information.

3. You can also submit a memorandum of law to explain what the law is and how it applies to the facts of your case. However, any facts on which you rely must be in an affidavit or affirmation; it is not sufficient to put them in a memorandum of law. Similarly, the affidavit or affirmation should contain only facts; do not include any references to the law in your affidavit or affirmation. If you prepare a memorandum of law, it must be sent to each defendant or his attorney(s).

4. Make a copy of the papers you have prepared for each defendant or his attorney. If several defendants share the same attorney, you need only make one copy for that attorney. Also retain a copy of the papers for yourself.

5. Mail (or hand deliver) the copy to the defendants or their attorneys. First class mail is sufficient.

6. Complete an affirmation of service form (see attached). Attach it to the original papers.

7. Bring or mail the original papers (with the affirmation of service attached) to the Pro Se Office at least two days before the return date of the motion. The return date is the date the motion is scheduled to be heard or when all papers must be submitted.

8. You should also submit an extra copy to the Pro Se Office for forwarding directly to the Judge, as a courtesy copy. If you do, please write "courtesy copy" in the upper right corner.

9. Telephone the Judge's chambers. Explain that you are a pro se litigant and that the other side has made a motion. Ask whether you are required to come to court to argue the motion. Generally, oral argument is not required.

10. If you need additional time to submit your papers, try to obtain the other side's consent. If possible, get their consent in writing. Then you submit the original writing to the Judge who will "so order" it. If the other side does not consent, you will need to make a motion for an extension (also called an enlargement) of time. There are separate instructions for preparing a motion, which are available upon request from this office.

NOTE: This illustrates the FORM for an affidavit or affirmation in opposition to a motion. The CONTENT of your affidavit or affirmation should depend on the facts of your case. Please draft your own affidavit or affirmation using this as a guide.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____, [insert your name] Plaintiff, -against- _____, [insert names] Defendants.	_____Civ._____( ) [insert both parts of docket number and judges initials]. AFFIDAVIT OR AFFIRMATION

STATE OF NEW YORK)

SS.:

COUNTY OF NEW YORK)

_____[your name],

affirms the following:

being duly sworn, deposes and says:

1. I am [plaintiff or defendant] in this action, and I respectfully submit this affidavit/affirmation in opposition to the motion dated _____ [insert date of the motion], made by _____[name of moving party] asking that the court order the following relief:

_____

[describe the relief sought by the motion as you understand it.]

The motion is scheduled to be heard on _____ [give date and time specified in the Notice].

2. I have personal knowledge of facts which bear on this motion because

_____

[State basis on which you learned of relevant facts.]

NOTE: If someone other than yourself has personal knowledge of relevant facts, he or she can submit an affidavit even if that person is not a party.

3. The motion should be denied because _____

[state facts which show that relief asked for in the motion is improper, unnecessary, or available through other means. Number each paragraph. Use as many pages as needed.]

4. In view of the foregoing, it is respectfully submitted that the motion should be denied.

Sworn to before me this day of _____198__ [sign before a licensed notary public of this state].

[signature]_____
[Type or print name]

or:

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____, _____
County State

[signature]_____
[Type or print name]

(date): , 198__

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

-v-

Affirmation of Service
____ Civ. _____ ( )

---X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

whose address is: _____

_____.

Dated: _____
New York, New York

_____
Signature

_____
Address

_____
City, State & Zip Code